

MEMORANDUM

August 8, 2014

To: Secretary Jeh Johnson, Department of Homeland Security

From: Congressional Asian Pacific American Caucus (CAPAC)

Re: CAPAC Recommendations on Immigration Enforcement and Administrative Relief

Creating a common sense immigration process is a top priority for the Congressional Asian Pacific American Caucus (CAPAC) and the diverse constituencies that we represent.¹ America has long been a nation of immigrants. Over the last few years, Asians have become the single largest demographic of new immigrants moving to the U.S. and make up the fastest growing racial population in the country. The Members of CAPAC are committed to working towards fair solutions to fix our broken immigration system.

Keeping families together is a cornerstone of our immigration policy, and family immigration matters are key issues for the Asian American and Pacific Islander (AAPI) community. This is why deportations have a significant impact on AAPI families in our country - making reform to the Department of Homeland Security's (DHS) enforcement practices and policies an important priority for the community.

Flawed enforcement practices and policies have separated millions of immigrant families. AAPIs make up approximately 11% of the undocumented population in our country.² Five of the top ten source countries for undocumented immigrants in the U.S. are Asian, making hundreds of thousands of AAPI families vulnerable to DHS's current enforcement policies.³ Between 2009 and 2012, over 236,000 AAPI immigrants were removed from the U.S.⁴ Additionally, legal permanent residents from Southeast Asian countries, many who arrived to the U.S. as refugees, disproportionately face deportation and are three times more likely to be deported on criminal grounds compared with other immigrants.⁵

In addition, young people in the AAPI community are vulnerable to deportation and family separation. Due to various cultural factors, undocumented immigrants from Asia and the Pacific Islands remain less visible than other ethnic counterparts and are less willing to come forward with their status. They are also less likely to trust the Deferred Action for Childhood Arrivals (DACA) process due to fear that they or their family members will face deportation once personal information is submitted to DHS.⁶ This may be a contributing factor as to why

¹ The Congressional Asian Pacific American Caucus (CAPAC) is comprised of 41 Members of Congress who are of Asian and Pacific Islander descent and Members who have a strong dedication to promoting the well-being of the Asian American and Pacific Islander (AAPI) community. Currently chaired by Congresswoman Judy Chu, CAPAC has been addressing the needs of the AAPI community in all areas of American life since it was founded in 1994.

² White House Initiative on AAPIs; <http://www.ed.gov/edblogs/aapi/files/2013/04/WHIAAPI-Immigration-Fact-Sheet.pdf>

³ U.S. Department of Homeland Security, "Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011" (March 2012), available at

https://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2011.pdf

⁴ U.S. Department of Homeland Security, "Yearbook of Immigration Statistics: 2012" (Data Tables 40 and 41), available at

<http://www.dhs.gov/yearbook-immigration-statistics-2012-enforcement-actions>

⁵ Transactional Records Access Clearinghouse, Syracuse University available at <http://trac.syr.edu/>

⁶ Lim, Zi Heng, "For Asian Undocumented Immigrants, a Life of Secrecy," The Atlantic, May 14, 2013.

only 2.6 percent of DACA recipients are AAPI, even though approximately 8 percent of young people who are eligible for DACA are from Asian countries.⁷

Finally, and most significantly, the family immigrant visa backlogs disproportionately affect the AAPI community with devastatingly long wait times to reunite with their loved ones. As of November 2013, approximately 4.2 million individuals are waiting in the family visa backlogs, nearly half of whom are from Asian countries.⁸ Not surprisingly, the Asian countries with the largest visa backlogs are also the home countries of many undocumented Asians. Many family members eligible for family-based visas already live in the U.S. but are at risk of deportation and separation due to existing 3- and 10-year unlawful presence bars. As a result, these individuals either do not leave the country to pursue their visas, or face long separation from their families because their departure triggers bars to re-entry.

As DHS conducts its review of enforcement policies and practices, we strongly urge you to take bold action to stop the pain inflicted on families through deportations and detention. Additionally, there are a number of enforcement-related reforms DHS should undertake to promote fairness and family unity. The Congressional Asian Pacific American Caucus submits the following recommendations that call for administrative relief as well as reforms to immigration enforcement that will make enforcement more humane and effective.

Recommendations for Administrative Relief

1. DHS should keep families together by expanding deferred action.

- Since the Deferred Action for Childhood Arrivals (DACA) program was announced in 2012, the policy benefitted thousands of young undocumented people who came to the U.S. as children. DHS's DACA memo states the Executive Branch has the authority to set forth policy for the exercise of discretion within the framework of existing law.⁹
- Yet, millions of families are still at risk of separation. 5.1 million children in the U.S. live in mixed-legal status families.¹⁰ Approximately 4 million of these children are U.S. citizens. Between July 2010 and September 2012, nearly 205,000 parents of U.S. born children were deported from the U.S.¹¹ Over 5,100 children were in foster care because their parents were detained or deported in November 2011 alone.¹²

⁷ Immigration Policy Center, "Who and Where the DREAMers Are: A Demographic Profile of Immigrants Who Might Benefit from the Obama Administrations Deferred Action Initiative" July 2012; U.S. Citizenship and Immigration Services, Number of I-821 D, Consideration of Deferred Action for Childhood Arrivals (2012-2014), *available at* <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA-06-02-14.pdf>

⁸ U.S. Department of State, Visa Bulletin November 2012, *available at* <http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2013/visa-bulletin-for-november-2012.html>; *See also*, "For Asian-Americans, Immigration Backlogs Are a Major Hurdle," NPR, *available at* <http://www.npr.org/blogs/itsallpolitics/2013/01/31/170744897/for-asian-americans-immigration-backlogs-are-becoming-a-major-hurdle>

⁹ U.S. Department of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, *available at* <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>

¹⁰ Passel J, Taylor P. Unauthorized immigrants and Their U.S. Born Children, Pew Hispanic Center, August 2010 *available at* <http://www.pewhispanic.org/2010/08/11/unauthorized-immigrants-and-their-us-born-children/>

¹¹ "Nearly 205K Deportations of Parents of U.S. Citizens in Just Over Two Years", Colorlines, *available at* http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html

¹² Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System," Applied Research Center, 2011, *available at* <https://www.raceforward.org/research/reports/shattered-families>

- To prevent unnecessary separation of families, DHS should formulate requirements similar to those of DACA and consider deferred action on a case-by-case basis for parents, spouses, and siblings of DACA recipients, U.S. citizens and lawful permanent residents.
- 2. DHS should make administrative changes to DACA so that more people may benefit from the program.**
- DHS should expand the DACA program to all immigrants who entered the U.S. before the age of 16, regardless of how old they are today. The DACA program currently excludes immigrants who have been in the U.S. since childhood but were born before June 15, 1981. This restriction excludes those who arrived to the U.S. as children and have been residing and contributing to the U.S. the longest.
 - DHS should move the DACA continuous residence cut off to June 15, 2009 from June 15, 2007. The current guidelines require continuous residence for 5 years. They should be updated to include young immigrants who currently have 5 years of continuous residence in the U.S. and who otherwise would qualify for DACA.
- 3. DHS should parole immediate family members of U.S. citizens and legal permanent residents who have pending immigrant visa applications in order to reduce backlogs and to promote family unity.**
- Out of the 4.2 million family members waiting in the family backlogs, nearly 2 million are Asian.¹³ Among individuals waiting for employer-based visas, Asian countries account for 84 percent of the backlog of 112,000 applications. Some applications take as long as 23 years before a green card is issued.
 - Allowing individuals with pending immigrant visa petitions to apply for parole on a case-by-case basis would allow the potential beneficiaries of immigrant visas to reunite with their family in the U.S. until their priority date becomes current.
- 4. DHS should assign a single visa number to each family unit when considering the cap limitations on family-based, employment based and diversity visa categories under the Immigration and Nationality Act § 203(d).**
- DHS should count family immigrant visa beneficiaries and their derivatives (i.e. spouses and minor children) as one unit with one single visa number. Current practice counts both the principal visa beneficiaries and their derivatives against the visa caps. This method of counting each and every family member has the effect of creating even greater demand for the already limited number of visas available each year. However, this practice is not required by statute (see e.g. INA) § 203(d).
 - Counting a family as one unit will further the goals of family unity and would help reduce the backlogs. It would also bolster the economy by bringing more qualified workers into the U.S.

¹³ Karthick Ramakrishnan and Farah Z. Ahmad, Immigration: Part of the “State of Asian Americans and Pacific Islanders” Series, Center for American Progress, April 23, 2014, *available at* <http://cdn.americanprogress.org/wp-content/uploads/2014/04/AAPI-Immigration1.pdf>.

5. DHS should immediately designate Temporary Protected Status (TPS) for the entire Philippines.

- The Philippines was devastated by Typhoon Haiyan in November 2013. The powerful Category 5 super hurricane killed over 5,000 people, caused extraordinary damage, and displaced over 4 million people. Safely returning to the country is nearly impossible due to the devastation. Given the ravaged communities, as well as the difficulty in integrating displaced persons, the Philippines meets the necessary requirements for full TPS.

Recommendations on Immigration Enforcement

Listed below are ways in which DHS can adjust its current policies and practices to reflect a more humane and fair approach to immigration enforcement.

DHS enforcement should protect and prioritize family unity.

1. Expand the provisional unlawful presence waiver process to all persons who are statutorily eligible for the waiver and can immediately benefit from it.

- A significant number of undocumented immigrants in the U.S. may be eligible to obtain legal status through a qualifying family member but must travel abroad to obtain an immigrant visa, triggering the 3-and 10-year unlawful presence bars. Many immigrants who have legal avenues to adjust their status are discouraged from pursuing their application. The provisional waiver process helps alleviate this problem by allowing certain qualifying relatives to apply for waivers in the U.S.
- In order to further protect family unity, the United States Citizenship and Immigration Services (USCIS) should make the provisional waiver process available to all individuals who are statutorily eligible for a waiver. To achieve this, USCIS should expand the provisional unlawful presence waivers process to the spouses and children of lawful permanent residents (LPRs) and the unmarried adult children of U.S. citizens with current priority dates. This would allow these individuals to apply for unlawful presence waivers from within the U.S and thus avoid triggering the 3-and 10-year bars. This extension would be consistent with the stated intent of the law under which the waiver process was created (INA 212(a)(9)(B)(v)).
- USCIS should make provisional waivers available to individuals whose cases have been administratively closed. A large percentage of cases that have been administratively closed involve individuals with deep ties to the U.S. and many who have close U.S. citizen family—the very same people who may be eligible under hardship waivers. This would also result in a more effective administration of DHS’s prosecutorial discretion initiative.
- Similarly, USCIS should make provisional waivers available to individuals in removal proceedings and individuals with outstanding Notices to Appear (NTA). If granted, eligible individuals would then move to dismiss or terminate proceedings, allowing them to depart the U.S. for the immigrant visa interview.

- USCIS should permit concurrent filing of provisional unlawful presence waivers and I-212 waivers, which grants permission to reapply for admission after a prior deportation or removal. This would allow more people to benefit from the provisional waiver process and utilize current avenues to apply for permanent residency. Without concurrent filing, individuals who have potential avenues to obtain status would remain undocumented in the U.S. for fear of triggering the 3-and-10 year bars.
- In 2012, USCIS began permitting the undocumented spouses, parents, and children of U.S. citizens to apply for unlawful presence waivers from within the U.S. if they can establish extreme hardship to a U.S. citizen spouse, or parent. This rulemaking improved the process but has also fallen short of its intended goal of family reunification. Expanding the provisional waiver process to spouses and children of LPRs and the unmarried adult children of U.S. citizens would satisfy Congressional intent and improve the current legal avenues individuals have to obtain permanent residency.

2. Interpret “extreme hardship” broadly.

- “Extreme hardship” is not statutorily defined and is applied in a strict and an ill-defined manner.
- A broader interpretation of extreme hardship would keep more families intact. In some cases, individuals who are eligible for a green card may be unable to acquire it because they fear being subject to a 3-or 10-year bar. The bar would separate families for an undetermined amount of time.
- The Administration should clarify the “extreme hardship” standard to include factors such as family ties to the U.S., conditions in the country of removal, the age of the U.S. citizen and presence of LPR spouses or parents, relevant health and mental health conditions, and financial and educational hardships.

DHS enforcement priorities should be narrowed to focus on those who pose a real threat to our communities.

3. Refrain from prioritizing individuals with only immigration law violations as a priority for removal.

- Over 40 percent of individuals removed in FY 2013 have no criminal background.¹⁴ And only 12 percent of all deportees have been found to have committed a serious or “Level 1” offense, which would make them the highest priority for enforcement.¹⁵ Instead of prioritizing enforcement against those who pose a real threat to our communities, DHS’s policies continue to target individuals whose most serious convictions is an immigration violation or traffic offense.¹⁶

¹⁴ FY 2013 ICE Immigration Removals, *available at* <https://www.ice.gov/removal-statistics/>

¹⁵ “Secure Communities and ICE Deportations: A Failed Program?” Transactional Records Access Clearing House, Syracuse University, *available at* <http://trac.syr.edu/immigration/reports/349/>

¹⁶ *Id.* See also, More Deportations Follow Minor Crimes, Records Show,” NY Times, April 6, 2014, *available at* <http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html>; Government records obtained by the NY

- There are increasing numbers of individuals deported or in removal proceedings only because of status-based crimes, such as illegal re-entry. Thousands of immigrants return to the U.S. only to be with their family members.
- DHS should eliminate criminal prosecution through Operation Streamline and consider entry-related prosecutions on a case-by-case basis for prosecutorial discretion, in line with DOJ's announcement instructing U.S. Attorneys to no longer charge nonviolent, low-level offenders with crimes that carry mandatory sentences.¹⁷

4. Narrow civil enforcement priorities and improve implementation of prosecutorial discretion.

- The 2011 Morton Memoranda on Civil Enforcement Priorities and Prosecutorial Discretion improved DHS enforcement policies, but those memos have fallen short in their implementation and still require improvements in the written policy. Evidence shows that individuals who are not a threat to national security or public safety and who have family residing in the U.S. continue to be removed.¹⁸ A contributing factor is the Morton Memo's overly broad categories for priority enforcement, which have a dragnet effect across the nation harming communities and families.
- The two most effective ways to make improvements in this area would be:
 - Refine the enforcement priorities that DHS currently uses to justify removal; and
 - Add language to clarify that individual cases falling into "priority" categories must still be assessed for equities, including the factors listed in the Morton Prosecutorial Discretion Memo, before they are pursued for removal.
- The priorities should be narrowed to reflect that:
 - **Priority 1:** Individuals whose only blemish is based on an immigration "status violation" or has an underlying "status violation" that led to a criminal conviction (e.g. immigration fugitives, re-entrants, immigration violators) should not be prioritized for removal, especially when they have strong familial ties to the U.S. and are not a threat to national security or safety.
 - **Priority 2:** Clarify this category by defining "recent illegal entrants" as those apprehended within 30 days or less of entry and apprehended within 25 miles of the border. Add language to clarify that individuals who have any period of residence in the U.S. exceeding 90 days in the prior three years and have significant ties to the U.S. should not be considered a priority.
 - **Priority 3:** Revise this category so that prior removal orders, illegal re-entry, and individuals who otherwise "obstructed immigration controls" who

Times through FOIA requests show that since President Obama took office, two-thirds of the nearly two million deportation cases involve people who have committed minor infractions, including traffic violations, or had no criminal record at all.

¹⁷ "DOJ should end 'felonization' of undocumented workers," The Hill (April 3, 2014), available at <http://thehill.com/blogs/congress-blog/judicial/202478-doj-should-end-felonization-of-undocumented-workers>

¹⁸ *Id.*

are not national security concerns, or have not been convicted of a serious crime (exempting status-related violations) are not priorities.

- DHS should screen every person apprehended for prosecutorial discretion and establish a presumption of hardship to grant prosecutorial discretion on a case-by-case basis for the following individuals: 1) close family of U.S. citizens, permanent residents, and recipients of DACA; and 2) individuals who have long resided in the U.S. or have employment, business, or strong community ties. This should also include individuals with decades old removal orders, where removal was not based on an underlying serious conviction.
- In all cases where prosecutorial discretion is favorably exercised, DHS should weigh the equities of each case and explore options such as deferred action, parole in place, joining motions to reopen, and stipulations of relief that provide the opportunity for the individual to apply for employment authorization or obtain permanent relief.

DHS should ensure due process and fairness for individuals who become the subject of enforcement.

5. Limit deportations without hearings.

- DHS should limit the use of summary removal procedures, such as expedited removal and reinstatement of removal, where an individual is deported by Immigration and Customs Enforcement (ICE) and Customs and Border Patrol (CBP) without a hearing before a judge.
- DHS should rescind the 2004 DHS regulation that greatly expanded the use of expedited removal to anyone encountered within 100 miles of the border who entered less than 14 days before.¹⁹
- DHS should decline to use any form of deportation or removal without a hearing against individuals who are *prima facie* eligible for relief from removal or prosecutorial discretion unless such individuals explicitly waive their right to seek such relief.
- DHS should create an administrative appeal process for individuals to challenge an expedited or stipulated removal order, visa waiver removal order, or voluntary departure.
- DHS should require all unrepresented individuals who agree to a stipulated removal to appear before an immigration judge, so that the judge may advise the individual of his or her rights and ensure that the individual has agreed to the order knowingly, intelligently, and voluntarily.

6. Fundamentally change detainer practice and policy.

- Detainers raise serious constitutional concerns.²⁰ A detainer is a request from federal immigration officials for state and local jails to hold a person so that ICE

¹⁹ CRS Report for Congress, “Immigration Policy on Expedited Removal of Aliens,” (September 2005) available at <http://trac.syr.edu/immigration/library/P13.pdf>

²⁰ *Galarza v. Szalczyk et al.*, 20012 WL1080020, 12-14 (E.D. Pa. Mar 30, 2012); See also *Morales v. Chadbourne*, (D.R.I. Feb 12, 2014) and *Arizona v. United States*, 567 U.S. (2012).

agents can investigate a person's immigration status. Currently, the detainer form requests that state and local police hold individuals for 48 hours after the time at which they would otherwise be released without probable cause, a hearing before a judge, or adequate notice. Such "holds" without probable cause raise serious Fourth Amendment concerns.

- Detainers are often placed indiscriminately on individuals who are not enforcement priorities, unnecessarily triggering their removal. ICE field officers and deputized 287 (g) personnel frequently issue detainers in cases where an individual has no criminal history and are not a public safety threat. In FY 2012, ICE issued over 270,000 immigration detainers, in large part through the 287 (g), Secure Communities program,²¹ and Criminal Alien programs.²²
- DHS should only issue detainers against individuals convicted of a criminal offense who are classified as a Level 1 offender (who are not immigration status violators). They should not be used on individuals who do not fall within DHS's redefined enforcement priorities or individuals merely charged with a crime.
- DHS should clarify that law enforcement must have "probable cause" that the individual is subject to removal before a detainer can be issued. Further, DHS should build in due process protections into the detainer process and require a factual basis for finding probable cause. DHS should also require Headquarters to review all detainers in order to promote accountability and transparency.

7. End 287 (g) and the Secure Communities Program.

- The 287 (g) and the Secure Communities programs are highly problematic and damaging to families and communities. They have led to substantial profiling of individuals as well as unlawful detentions.²³
- When immigrants fear local police, communities become less safe and individuals are less likely to report crime for fear of being deported.
- Immigration enforcement should be conducted by federal officials, who are better equipped to enforce and exercise discretion for immigration-related violations, not state and local law enforcement.
- States and localities should not be required to participate in immigration enforcement programs.

²¹ "Number of ICE detainers drop by 19 percent," Trac Immigration (January 2013), available at <http://trac.syr.edu/whatsnew/email.130724.html>

²² *Id.*

²³ See Garner, Trevor, II and Kolhi, Aarti, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, The Warren Institute (September 2009) available at http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf; see e.g. Department of Justice, *Justice Department Releases Investigative Findings on Alamance County, N.C., Sheriff's Office*, (September 18, 2012) available at <http://justice.gov/opa/pr/2012/September/12-crt-1125.html>.